

STATE OF MICHIGAN
COURT OF APPEALS

MAYO SOSINSKI and LEONARD SOSINSKI,

Plaintiffs-Appellants,

v

CYNTHIA M. TROSIN, D.O., P.C. and
CYNTHIA M. TROSIN, D.O.,

Defendants,

and

MYRON R. EMERICK, D.O.,

Defendant-Appellee.

UNPUBLISHED

August 26, 2003

No. 239781

Macomb Circuit Court

LC No. 96-005055-NH

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order striking plaintiffs' affidavit of merit and granting defendant Myron Emerick summary disposition. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

Plaintiffs argue that the trial court erred in striking their affidavit of merit and granting summary disposition in favor of Dr. Emerick. The dispositive issue on this appeal is whether the trial court was required by the law of the case doctrine to follow an earlier determination from this Court. We conclude that the law of the case doctrine is inapplicable.

I. Procedural History

The procedural history of this medical malpractice case is unusual. On June 21, 1996, plaintiffs filed their complaint and attempted to file a motion to extend the time in which to file an affidavit of merit. However, plaintiffs did not file the motion with the lower court clerk but presented the motion directly to the circuit court. The court advised plaintiffs that a hearing on the motion was necessary. On July 3, 1996, twelve days after filing their complaint, plaintiffs filed the motion. The trial court granted the motion on July 15, 1996, and plaintiffs filed their affidavit of merit four days later. Defendants moved for summary disposition on the ground that the period of limitations had expired. The trial court granted summary disposition to all

defendants, ruling that the period of limitations had expired at the time plaintiffs filed the complaint on June 21, 1996.

This Court affirmed the trial court's order with respect to defendant Cynthia Trosin but reversed with respect to Dr. Emerick. This Court held in an unpublished opinion that the filing of a motion to extend the time for filing the affidavit of merit tolled the statute of limitations. This Court determined that the period of limitations against Dr. Emerick was due to expire on July 8, 1996, but that it was tolled when plaintiffs filed their motion five days earlier, on July 3, 1996. Accordingly, this Court concluded that the complaint against Dr. Emerick was timely filed. *Sosinski v Trosin*, unpublished opinion per curiam of the Court of Appeals, issued 01/16/01 (Docket No. 217178).

Thirty-five days after the case was remanded, a different panel of this Court published its decision in *Barlett v North Ottawa Community Hosp*, 244 Mich App 685; 625 NW2d 470 (2001). *Barlett* held that, although MCL 600.2912d(2) provides an additional twenty-eight days to file an affidavit of merit for good cause, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. *Id.* at 691-693. Instead, it is the granting of a motion that tolls the limitations period in a medical malpractice action. *Id.*

After this case was remanded, Dr. Emerick filed a motion to strike the affidavit of merit on the ground that plaintiffs failed to show good cause to extend the time for filing it. The trial court was faced with the determination of this Court that the affidavit of merit was timely based on the *filing* of the motion while recognizing that the published decision in *Barlett* held that the determinative factor was the *granting* of the motion. The trial court relied on the decision in *Barlett* and granted summary disposition on the ground that the period of limitations had expired before plaintiffs filed their affidavit of merit. This appeal followed.

II. Analysis

Absent factual disputes, the determination whether a claim is barred by the expiration of the limitations period is a question of law that we review de novo. *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002). A trial court's grant of summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Id.* at 449.

Pursuant to the law of the case doctrine, a ruling by this Court binds the trial court on remand. *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 661; 633 NW2d 1 (2001). A trial court "may not take any action on remand that is inconsistent with the judgment of the appellate court" and the doctrine applies "regardless of the correctness of the appellate court's decision." *Id.* at 662 (citations omitted). "However, the doctrine does not apply where there has been an intervening change of law." *Id.*

Here, an intervening change of law occurred. In a medical malpractice action, a plaintiff must comply with the statutory filing requirements under MCL 600.2912d(1), which provides that the plaintiff or his attorney "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness" The "[u]se of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory and imperative." *Scarsella v Pollak (Scarsella II)*, 461 Mich 547, 549; 607 NW2d 711 (2000) (citation omitted). The existing case law construing the statutory

authority governing medical malpractice actions states that the failure to timely file a complaint and an affidavit of merit will not toll the applicable limitations period. *Young, supra* at 450. MCL 600.2912d(2) provides:

Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

Prior to the decision in *Barlett*, no published appellate decision squarely addressed the question whether the period of limitations was tolled by the filing or by the granting of a motion to extend the time in which to file an affidavit of merit. In the first appeal in this case, this Court determined the question by merely citing to the general legal principles in *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 229; 561 NW2d 843 (1997) and *Scarsella v Pollak (Scarsella I)*, 232 Mich App 61, 64; 591 NW2d 257 (1998), *aff'd, Scarsella (II), supra*. These two cases did not address the issue at hand and this Court's determination was not grounded on the rule of law in *Solowy* and *Scarsella*. Rather, the rule of law for the issue in this case was established for the first time in *Barlett*. We conclude that the decision in *Barlett* constitutes an intervening change of law. Accordingly, the holding of this Court in the first appeal was not binding on the trial court.

In this case, plaintiffs filed their complaint seventeen days before the statute of limitations expired. Plaintiffs were immediately informed by the circuit court that a hearing was required for their motion seeking a twenty-eight-day extension of time under MCL 600.2912d(2) in which to file their affidavit of merit. However, plaintiffs waited twelve days until they filed their motion, five days before the period of limitations expired. Relying on *Barlett, supra*, the trial court granted Dr. Emerick's motion for summary disposition after stating that the order granting an extension of time was not entered until after the expiration of the statute of limitations. We conclude on the basis of *Barlett* that the trial court properly granted the motion for summary disposition because the court's actual grant of an extension of time did not occur until after the expiration of the statute of limitations.

In light of the above conclusion, we need not address plaintiffs' remaining arguments on appeal.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens